NO. 83-644

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH, and TRUSTORS OF HERITAGE TRUST COMPANY
*Petitioners,*

v.

RELIANCE INSURANCE COMPANY and JOHN R. BROMLEY
*Respondents.*

## RESPONDENT RELIANCE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEPHEN G. TIPPS
DAVID E. WARDEN
BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002
(713) 229-1234
*Attorneys for Respondent Reliance Insurance Company*

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

## QUESTIONS PRESENTED FOR REVIEW

1. Is an alleged co-conspirator an indispensable party under Rule 19, Federal Rules of Civil Procedure?

2. May a federal court which attained jurisdiction of a case by removal from a state court on the basis of diversity of citizenship deny plaintiffs' motion for leave to amend their complaint to add a non-diverse party defendant if that party defendant is not an indispensable party to the action?

3. Is mandamus the appropriate remedy to obtain appellate review of a district court's denial of leave to amend a complaint to add a new party defendant?

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

CASES



STATUTES



RULES

NO. 83-644

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH, and TRUSTORS OF HERITAGE TRUST COMPANY
*Petitioners,*

v.

RELIANCE INSURANCE COMPANY and JOHN R. BROMLEY
*Respondents.*

## RESPONDENT RELIANCE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Reliance Insurance Company requests that the Petition for Writ of Certiorari in this matter be denied.

## STATEMENT OF THE CASE

This case involves an alleged civil conspiracy to defraud. It was brought by Petitioners Hatch (plaintiffs below) against Respondent Reliance Insurance Company ("Reliance") in a Texas state court, but was removed to

federal court on the basis of diversity of citizenship. The case arrives at this Court by way of Petitioners' application for writ of mandamus to reverse the order of the District Court denying leave to add a non-diverse party defendant, alleged to be a co-conspirator with Reliance. The Fifth Circuit Court of Appeals refused to issue a writ of mandamus.

Petitioners have wholly failed to sustain their burden of establishing any reason why this Court should grant review on certiorari, as set forth in Rule 17, Rules of the Supreme Court of the United States. Alleged co-conspirators are not indispensable parties and the District Court properly denied the motion to add a new party defendant. Further, mandamus does not lie to review a district court's decision to refuse amendment to add a party defendant.

While this case was filed in August, 1982, the events giving rise to it occurred much earlier, in the early 1970's, and have already been the subject of substantial prior litigation. The Petition for Writ of Certiorari contains gross mischaracterizations and misstatements of fact regarding the history of this matter and the proceedings below, requiring Reliance to set out here a full description of the case prior to presenting its specific arguments in opposition to the Petition.

## I. Events and Proceedings Prior to the Filing of the Instant Action

Respondent Reliance issued a commercial blanket fidelity bond in the penal amount of one million dollars ($1,000,000.00) to Heritage Trust Company, then known as Federal Trust Company ("Heritage"), in Arizona on December 15, 1972. This bond remained in force and

effect until August 15, 1974, at which time it was cancelled. By this bond, Reliance agreed to indemnify Heritage for losses to Heritage, which losses were occasioned by fraudulent or dishonest acts of covered employees. The bond was not intended to, and does not, provide coverage running to the investors or trustors of Heritage or other third parties.

At all times material to this litigation, Heritage was owned and controlled by John R. Bromley and his wife, Bertha. Heritage was, at all relevant times, an Arizona corporation with its principal place of business in Arizona. After cancellation of the bond by Reliance, more than 40 lawsuits were brought in various jurisdictions against Heritage and its principal officers, the Bromleys. The lawsuits uniformly sought recovery of funds against Heritage and the Bromleys on the basis of various allegations sounding in fraud. Reliance was not a party to any of these lawsuits and had no notice or knowledge of them. No claim was asserted against the aforementioned bond in any of these actions.

One of these lawsuits against Heritage was brought on December 16, 1975, by Robert and Claudia Hatch in the 56th Judicial District of Galveston County, Texas. The Hatches had entrusted an amount of approximately $11,000 to Heritage to invest and manage for them in high-yield, capital-growth investment ventures. When the Hatches sued in Galveston County, service upon Heritage and its officers was made by service of a summons and complaint on the Secretary of State of Texas, pursuant to the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2039b. Neither Heritage nor the Bromleys appeared to defend this action, and, in fact, have asserted that they

never had any notice of the Texas action. On March 5, 1976, the Hatches obtained a default judgment against Heritage and its officers in the Texas court in the sum of $129,972.22. Reliance was not a party to this Texas action and had no knowledge of it. The Texas lawsuit made no claim against or mention of the Reliance bond.

On April 16, 1976, the Superior Court of Arizona, Maricopa County, pursuant to Section 6-865, Arizona Revised Statutes, appointed the Arizona State Superintendent of Banks as Receiver for Heritage Trust Company and authorized the Receiver to obtain possession and control of the assets of Heritage. In conjunction with that receivership, the Arizona court entered an order staying all persons and their attorneys from commencing, prosecuting, continuing or enforcing any proceeding against Heritage or its assets, and further enjoining such persons from causing to be executed any execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property owned by or in possession of the Receiver of Heritage. On July 26, 1976, the Receiver filed an action in the Superior Court of Arizona against Reliance, seeking to recover, in his capacity as Receiver for Heritage, the full penal sum of the bond based upon the alleged fraudulent and dishonest acts of the Bromleys. This was the first attempt by anyone to assert a claim against the bond, and the first action involving Heritage of which Reliance had notice or was a party.

In March, 1977, eight months after the Receiver filed his lawsuit against Reliance, the Hatches initiated a garnishment action in Texas against Reliance by which they sought payment of their $129,972.22 default judgment

against Heritage from the bond proceeds. This matter was assigned Cause No. 114,361-A in the District Court of Galveston County, Texas.

On November 15, 1977, as a result of the two inconsistent claims against the prospective bond proceeds, Reliance instituted an action in the nature of interpleader in the United States District Court for the District of Arizona, in which Reliance sought a determination of the respective parties' right and entitlement, if any, to the proceeds of the commercial blanket bond issued by Reliance to Heritage.

In conjunction with the prosecution of the action in the nature of interpleader, the United States District Court for the District of Arizona, on March 6, 1978, entered its Order Granting Permanent Injunction and Requiring Interpleader by which it permanently enjoined and restrained, *inter alia*, Robert C. and Claudia R. Hatch, from

> instituting or prosecuting in any State court, or in any United States court, any suit or proceeding on account of or pertaining to the liability of Reliance Insurance Company on account of the issuance of its bond number B 729077 to Heritage Trust Company, or from continuing with the prosecution of any action or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond. . . .

*See* Appendix A.

On August 8, 1979, the Hatches filed a motion entitled Motion for Declaratory Judgment in the interpleader action seeking a ruling that, by reason of their Texas garnishment, they had priority over the claims of all other

unsecured creditors to any funds found owing from Relance to Heritage by virtue of the bond. The Arizona District Court determined that the Hatches had no priority claim to the funds and denied their motion by order of February 6, 1980, as amended on March 20, 1980. The Hatches then moved the District Court for a new trial, which motion was denied by order dated March 10, 1980. The Hatches appealed, and oral argument was presented to the United States Court of Appeals for the Ninth Circuit on October 15, 1981. On November 5, 1981, the Ninth Circuit issued its Memorandum Opinion unanimously affirming the order below. The Hatches moved for rehearing *en banc*, which was denied on December 23, 1981.

The Hatches then sought intervention and reversal by this Court, by Petition for Writ of Certiorari dated March 12, 1982. That Petition was denied by order dated May 3, 1982, and the Hatches' petition for rehearing by this Court was denied on June 7, 1982.

After entry of the final order of the United States Court of Appeals for the Ninth Circuit, but during the appellate proceedings conducted in this Court, the United States District Court for the District of Arizona, having determined that Robert C. and Claudia R. Hatch did not have any priority claim to the bond proceeds, if any, and that, therefore, the Hatches had no claim to the bond proceeds other than as general creditors, entered its order on January 12, 1982 terminating further participation in the interpleader action by Robert C. or Claudia R. Hatch.

During the processing of the Hatches' appeals, the underlying action in the nature of interpleader was proceeding toward trial, which had been scheduled for March

30, 1982. Numerous status conferences were held with the Receiver and a lengthy and detailed pretrial order was filed in the United States District Court for the District of Arizona. The Hatches' interest, along with the interest of all other general creditors, was of course represented by the Receiver. The matter of the Receiver's right and entitlement, if any, to the bond proceeds was fully and finally resolved prior to trial, and the interpleader action was dismissed with prejudice on February 24, 1982.

## II. Proceedings in the Instant Case

After settlement and dismissal of the Receiver's case against Reliance and after denial of the Hatches' Petition for Writ of Certiorari in this Court, the Hatches then filed the instant case on August 5, 1982 in the District Court of Galveston County, Texas, 212th Judicial District, where it was assigned Cause No. 123,723. Service was made on Reliance's registered agent in Texas on August 11, 1982, and on September 7, 1982, the case was removed to the United States District Court for the Southern District of Texas, Galveston Division on the basis of diversity of citizenship, where it was assigned Cause No. G-82-358.[1] Petitioners Hatch are citizens of

1. Petitioners Hatch complained that Reliance's petition for removal, and the amendments thereto, were defective, and that removal was improper. The specific complaint was that Reliance's petition for removal did not expressly state the citizenship of Reliance at both the time of removal and the date the lawsuit was filed, a time span of about three weeks. Reliance maintained that the original petition for removal and the pleadings then on file made it obvious that diversity of citizenship existed at all relevant times. This is not a question presented for review in the instant Petition, and, moreover, after full briefing and oral argument on the Hatches' motion for remand the United States District Court for the Southern District of Texas, Galveston Division ruled that removal was proper and retained jurisdiction of the case.

the State of Texas, while Respondent is and has been at all relevant times a citizen of the State of Pennsylvania, having been incorporated in Pennsylvania since March 27, 1820 and having always maintained its principal place of business in Pennsylvania.[2]

On November 30, 1982, Reliance moved the District Court for the Southern District of Texas, Galveston Division to transfer venue of this action under 28 U.S.C. § 1404(a) to the United States District Court for the District of Arizona. The reasons for the requested change of venue were: that all transactions and events giving rise to the Hatches' complaint took place in Arizona; that all prior judicial proceedings involving Reliance in the subject transactions took place in the interpleader action in Arizona; that most of the fact witnesses resided in Arizona; and, finally, that the convenience of the parties and witnesses, the location of books and records, and the interests of justice all weighed heavily in favor of transfer. After full briefing and oral argument, Reliance's motion for change of venue was granted on June 29, 1983. The case currently resides on the docket of the United States District Court for the District of Arizona where it bears Cause No. CIV-83-1266-PHX-WPC.

In ancillary proceedings in the United States District Court for the District of Arizona, Reliance Insurance Company filed a petition for order to show cause why

---

2. It is important to note that the *only defendant* in this action at the time of removal was Reliance Insurance Company. In addition, although the Hatches' attorney, Mr. Cumming, has chosen to style this action to include "trustors of Heritage Trust Company" no class has ever been identified and no effort has been made to certify any class.

the instant case filed by the Hatches in Texas in 1982 was not in contempt of the permanent injunction entered in the interpleader action. The court ordered that the Hatches and their attorney, Mr. Robert B. Cumming, appear for hearing on the matter, and hearings were held before the Honorable Valdemar A. Cordova on January 12, 1983 and April 25, 1983. After the second hearing the court ruled that several of the causes of action set forth in the instant lawsuit were in contempt of the permanent injunction and ordered that the Hatches amend their complaint to remove those causes of action. It was after the first contempt hearing on January 12 that Mr. Cumming began a flurry of activity in the Texas state court, flagrantly ignoring the rules of procedure and disregarding any precept of an orderly and efficient handling of the litigation.

Following the January 12 hearing on the contempt matter in Arizona, the Hatches filed a pleading entitled Plaintiffs' First Amended Original Petition on January 26, 1983 in Cause No. 123,723 in the Texas state court, even though the matter had been removed to the federal court six months earlier. This amended pleading did not remove the causes of action that were later ruled to be in contempt of the interpleader injunction, nor did it add any party defendant.

Next, on March 28, 1983, continuing to ignore the jurisdiction of the federal court over the instant case, the Hatches filed a pleading entitled Motion to Confirm Jurisdiction and Declare Interpleader Bond with Surety Void in Cause No. 123,723 in the 212th District Court of Galveston County, Texas. On April 4, 1983 a hearing was held, over Reliance's objections, in the Texas state

court, ostensibly regarding that motion, and several orders were entered.[3]

One of the April 4 orders reinstated on the docket Cause No. 114,361-A, the original garnishment action against Reliance filed in 1977, which had been dismissed for lack of prosecution on January 26, 1981.[4] Another of the orders declared the bond filed by Reliance in November, 1977 when it instituted the interpleader in the United States District Court for the District of Arizona void *ab initio* and, therefore, that the Arizona court never had jurisdiction of the garnishment action, Cause No. 114,361-A. Finally, another of the April 4 orders ruled that Cause No. 123,723 (the instant case) was a continuation of Cause No. 114,361-A (the garnishment case), and that removal had, therefore, been improper because more than thirty days had elapsed between the filing of the petition for removal (in Cause No. 123,723) and service of process on Reliance in April, 1977 (in Cause No. 114,361-A). See Petition for Writ of Certiorari, Appendix C.

Reliance then filed a motion for reconsideration of the orders entered on April 4, 1983 in the state court. A hearing was held on April 18, 1983, after which the

---

3. The hearing was held despite the fact that on November 23, 1982 a notation was made on the docket sheet of the 212th District Court of Galveston County, Texas for Cause No. 123,723 which reads as follows:

> This cause having been removed to the United States District Court for the Southern District of Texas, Galveston Division, as evidenced by copy of the petition for removal filed with the Clerk of this Court, it is ordered that this Court should proceed no further herein unless this case is remanded.

4. No motion had been made for reinstatement, as is required by Rule 165a, Texas Rules of Civil Procedure. Further, pursuant to Rule 165a the court was without jurisdiction even to consider reinstatement, the matter having been dismissed over two years earlier.

Honorable Don B. Morgan reversed his order reinstating Cause No. 114,361-A, deciding that the language of Rule 165a, Texas Rules of Civil Procedure, was clear in providing no discretion for the court to reinstate a case after the passage of more than six months from the date the case was dismissed. Since the garnishment case, Cause No. 114,361-A, was now officially off of the court's docket, and the instant case, Cause No. 123,723, had been removed to the federal court as Cause No. G-82-358, there were no active cases on this matter in the state court. As a result, the other orders entered by the state court with respect to these cases at a time when that court did not have jurisdiction over them are null and void.[5]

On June 17, 1983 the Hatches filed a motion for leave of court to file an amended complaint in Cause No. G-82-358 in the federal court, and attached to that motion a pleading entitled Plaintiffs' Second Amended Original Petition, which was styled to be filed in Cause No. 123,723 in the state court. It is in this Second Amended Original Petition that the Hatches first attempt to add John R. Bromley, now a resident of Texas, as a party defendant in this action.[6]

On June 29, 1983 the Honorable Hugh Gibson, United States District Judge of the District Court for the Southern

---

5. *See, e.g.*, National S.S. Co. v. Tugman, 106 U.S. 118 (1882); Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962).

6. It should be noted that Petitioners attempted to add Bromley as a party defendant in Cause No. 114,361-A by an amendment to the petition in that case shortly after it was reinstated on April 4, 1983. However, service of that amended petition was never made on Mr. Bromley, and, in any event, within two weeks time the court had reversed itself on the order reinstating that case.

District of Texas, Galveston Division ordered that the Hatches' motion to amend was granted insofar as necessary to allow them to remove the causes of action found in contempt of the interpleader injunction, but was denied with respect to adding John R. Bromley as a party defendant. See Petition for Writ of Certiorari, Appendix A.[7] On that same day, in separte orders, the District Court denied the Hatches' motion for remand and granted Reliance's motion for change of venue to Arizona.

Subsequent to the above described proceedings, the Hatches applied to the Fifth Circuit Court of Appeals for a writ of mandamus directing Judge Gibson to allow them to add John R. Bromley as a party defendant, which was denied. Petitioners' request for rehearing *en banc* regarding the writ of mandamus was also denied. Petitioners now seek the intervention and reversal by this Court, by Petition for Writ of Certiorari docketed on October 17, 1983.[8]

## SUMMARY OF ARGUMENT

One of the causes of action set forth in the Hatches' complaint is that Reliance conspired with John R. Bromley to defraud the Hatches by inducing them to invest

---

7. This Respondent has no knowledge of whether the Hatches ever filed their amended complaint in the federal court, but it appears that the amended complaint adding John R. Bromley as a party defendant was filed in the state court in Cause No. 123,723 and served upon John R. Bromley, because he answered that complaint in the state court on July 14, 1983.

8. Respondent received notice of the Petition for Writ of Certiorari on November 7, 1983, and subsequently filed for and was granted an extension of time within which to file a brief in opposition to the Petition for Writ of Certiorari to and including December 19, 1983

their money in a trust scheme set up by Heritage Trust Company. The crux of Petitioners' argument at this point in the proceedings is that they should be allowed to amend their complaint in the federal court to add John R. Bromley as a party defendant because he is an alleged co-conspirator with Reliance, and as such, their argument goes, he is an indispensable party to the litigation as that term is used in Rule 19, Federal Rules of Civil Procedure. The practical effect of adding Bromley, a Texas citizen, as a party defendant at this time would be to destroy the basis for federal jurisdiction and force remand of the matter to the Texas state court.

The United States District Court for the Southern District of Texas, Galveston Division ruled that Bromley as an alleged co-conspirator was not an indispensable party under Rule 19, and, therefore, denied Petitioners' motion to amend their complaint to add Bromley as a party defendant. On application for writ of mandamus the Fifth Circuit Court of Appeals agreed, and denied the writ.

Respondent Reliance's argument is three-fold: (1) Bromley as an alleged co-conspirator is not an indispensable party under Rule 19; (2) the District Court's decision was proper and the only course of action possible; and (3) mandamus does not lie to obtain appellate review of a district court's decision to refuse amendment to add a party defendant.

## ARGUMENT

### I. Alleged Co-Conspirators are not Indispensable Parties under Rule 19

This case arrives at this Court by way of Petitioners' application for writ of mandamus to review the order of

Judge Gibson denying leave of court to add Bromley as a party defendant. Rule 19, Federal Rules of Civil Procedure, governs the determination of whether or not Bromley is indispensable, but in this diversity action where the question of indispensability depends upon substantive law, the Texas law of civil conspiracy prescribes the substantive law on which the Rule 19 decision is based. *Challenge Homes, Inc. v. Greater Naples Care Center*, 669 F.2d 667 (11th Cir. 1982); *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3rd Cir. 1950).

Many courts have noted that the term "indispensable party" is a conclusion arrived at after completing the analysis in Rule 19. Only when a court finds that a person is one who should be joined but cannot be and that the litigation cannot go forward without the missing person is the label "indispensable" appropriate. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968); *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970). The relevant parts of Rule 19 state as follows:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process *and whose joinder will not deprive the court of jurisdiction over the subject matter of the action* shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties. . . .
>
> * * *
>
> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. *The factors to be considered by the court include: first, to what*

> *extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.*

(Emphasis added.)[9]

Bromley is obviously not a person to be joined if feasible as set forth in Rule 19(a) because his joinder would destroy diversity and thus deprive the district court of jurisdiction. Thus, the factors set forth in Rule 19(b) must be considered to determine if Bromley is an indispensable party. None of those factors would compel the court to dismiss the action if Bromley could not be joined: a judgment rendered in Bromley's absence will not be prejudicial to Bromley or any other party; and any judgment rendered pursuant to the law of civil conspiracy in Texas will be the same whether Bromley is a party to this action or not.[10]

In Texas, civil conspiracy is defined as a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. It is not the agreement itself, but an injury to the plaintiff resulting from an act done pursuant to the common purpose that gives rise to the cause of action. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922

9. The full text of Rule 19 is set forth in Appendix B.

10. The same holds true under the law of civil conspiracy in Arizona. Consolidated Tungsten Mines, Inc. v. Frazier, 348 P.2d 734 (Ariz. 1960).

(Tex. 1979); *Great National Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964). In order for there to be a conspiracy, some act must be committed, which if done alone, would give rise to a cause of action. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963). Civil conspiracy is a tort in which each of the members of the conspiracy are joint tortfeasors, each conspirator being jointly and severally liable for the total sum of damages resulting from the conspiracy. *Mims v. Bohn*, 536 S.W.2d 568 (Tex. Civ. App.—Dallas 1976, no writ); *Massey v. Farnsworth*, 353 S.W.2d 262 (Tex. Civ. App. —Houston [1st Dist.] 1961), *rev'd on other grounds*, 365 S.W.2d 1 (Tex. 1963).

The law of torts in Texas is consistent with that in most other jurisdictions in that when two or more persons jointly engage in the commission of a tort, such as civil conspiracy, they are jointly and severally liable and the injured person may sue all of them jointly, as many of them as he sees fit, or just one of them. In any event the injured party may obtain a judgment for the full amount of his damages. *Gulf, C. & S.F.R. Co. v. James*, 10 S.W. 744 (Tex. 1889); *Kress (S.H.) & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App.—Beaumont 1952, writ ref'd n.r.e.).

Bromley, therefore, is not an indispensable party to this action. The conclusion that co-conspirators are not indispensable parties has been reached by this Court and by courts in many other jurisdictions. *See State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) ("In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant." *Id.* at 463); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970) ("Rule 19, as amended in 1966, was not meant to unsettle the well-established

authority to the effect that joint tortfeasors or coconspirators are not persons whose absence from a case will result in dismissal for nonjoinder." *Id.* at 817.); *Picking v. Pennsylvania R. Co.*, 152 F.2d 753 (3rd Cir. 1945); *Professional Investors Life Ins. Co., Inc. v. Roussel*, 528 F.Supp. 391 (D. Kan. 1981); *Carl Gutmann & Co. v. Rohrer Knitting Mills*, 86 F.Supp. 506 (E.D. Pa. 1949) (where the court refused to join an alleged conspirator to defeat federal diversity jurisdiction).

Petitioners do not cite a single case from Texas, or from any other jurisdiction, which supports the position that a co-conspirator is an indispensable party to a case alleging conspiracy.[11] Petitioners have apparently confused the allegations one must make in a complaint to support a cause of action of conspiracy with the requisites of an indispensable party under Rule 19. This seems apparent from the fact that the great bulk of the cases cited in the Petition for Writ of Certiorari are cases wherein the allegation of conspiracy was made but there

11. The only case that even remotely supports Petitioners' view is Black v. Vaeth, 285 N.Y.S.2d 557 (City Court of Utica, Oneida County 1967). In *Black* the plaintiff alleged a conspiracy against two defendants who were husband and wife. The court held that conspiracy had not been properly alleged because there must be at least two conspirators and for these purposes a husband and wife were deemed a single entity. Then the court went on to make what appears to be an incorrect or mistaken statement: "[t]herefore, the plaintiff's charges of conspiracy must fail, not only because of lack of proof but because of her failure to include the other alleged conspirator as a party in this action." *Id.* at 563. This statement is supported by citation to Bereswill v. Yablon, 160 N.E.2d 531 (N.Y. 1959), which, however, does *not* support the proposition that all conspirators must be *parties to the action*. Undoubtedly what the *Black* court meant to state was that the cause of action of conspiracy cannot be maintained unless there are at least two independent entities conspiring. In any event, the case is certainly of little, if any, precedential value in a situation governed by Texas law.

was no allegation that there were two or more conspirators. Clearly, in cases such as that the cause of action must fail on its face.

Petitioners have missed entirely the principle of law that allows a party to sue any one tortfeasor from among a group of alleged joint tortfeasors for the entire amount of damages suffered. Thus, while one may not prove a conspiracy without showing that two or more people were involved, one need not sue more than one of the conspirators in order to recover damages sustained by that conspiracy. This rule of law is beneficial to plaintiffs in that it allows persons injured by joint tortfeasors to obtain a judgment against and full compensation from any of the joint tortfeasors, without being forced to go to the expense and trouble of filing suit against all of them.

## II. The District Court correctly refused to add Bromley as a Party Defendant

There is no disagreement between Petitioners and Respondent that if Bromley as an alleged co-conspirator was deemed an indispensable party to this litigation that the District Court should add Bromley as a party defendant and, thereafter, remand the case to the Texas state court since there would no longer be complete diversity of citizenship among the parties. Indeed, Judge Gibson in his order of June 29, 1983 set forth precisely that proposition. *See* Petition for Writ of Certiorari, Appendix A. *See also Jett v. Zink*, 362 F.2d 723 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966).

The District Court correctly ruled that Bromley was not an indispensable party, and thus leave to amend and

remand to the state court was not required. Moreover, upon finding that Bromley was not indispensable, the District Court did not even have the authority to allow amendment to add him as a party because such would have divested the court of its jurisdiction.

The instant case was properly and timely removed to federal court on the basis of diversity of citizenship pursuant to 28 U.S.C. §§ 1332 & 1441. To allow Petitioners to defeat the jurisdiction of the federal court by attempting to add a party who is not indispensable would violate the general rule established by this Court that a plaintiff cannot by his own actions, such as amending his pleadings, defeat jurisdiction that has validly attached.[12] *St. Paul Mercury Indemntity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Further, this Court more recently held that 28 U.S.C. § 1447(c) states the *exclusive* grounds on which a remand order may be based. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Section 1447(c) allows remand only if "the case was removed improvidently and without jurisdiction. . . ." Since Bromley is not an indispensable party a remand of the case may not now be forced by the District Court granting Petitioners' motion to add Bromley as a party. Remand by that avenue would be outside the scope prescribed by 28 U.S.C. § 1447(c), and would be an improper divestiture of jurisdiction. By moving to add Bromley as a defendant, Petitioners were actually requesting the District Court to destroy its own power to adjudicate the case. *See Faser v. Sears, Roebuck & Co.*, 674 F.2d 856, 859 (11th Cir. 1982); *In re Merrimack Mutual Fire Ins. Co.*, 587 F.2d 642, 646-47 (5th Cir. 1978).

---

12. Jurisdiction of the federal court attaches at the moment the petition for removal is filed in the state court. 28 U.S.C. § 1446(e).

## III. Mandamus is not the appropriate remedy to review the District Court's Decision

The use of the writ of mandamus as a means for immediate appellate review is severly restricted, and is oftentimes unavailable even when it can be shown that a district court actually has erred. Generally, the writ will issue only in situations where it is necessary to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a clear duty to do so. Even in those cases the writ will not issue if the complaining party has an adequate remedy by appeal or otherwise. *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1943); *Ex parte Chicago, R. I. & Pacific R.,* 255 U.S. 273 (1921). The standard for the use of mandamus as a remedy, therefore, is very strict, and is aptly stated as follows:

> The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error.

*American Airlines, Inc. v. Forman,* 204 F.2d 230, 232 (3rd Cir. 1953).

There do not appear to be many cases on point, but all cases found by Respondent indicate that mandamus would not issue to review an order by a district court denying leave to amend a complaint to join a new defendant. *In re Arthur Anderson and Co.,* 621 F.2d 37

(1st Cir. 1980); *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64 (8th Cir. 1976); *Hartford Fire Ins. Co. v. Herrald*, 434 F.2d 638 (9th Cir. 1970); *D'Ippolito v. Cities Service Co.*, 374 F.2d 643 (2d Cir. 1967). Indeed, in situations involving the diversity jurisdiction of a federal court this Court has very narrowly prescribed the use of mandamus only to review district court remand orders which on their face state openly that the court relied on a non-Section 1447(c) ground for remand. *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

The instant case presents no such extraordinary situation demanding immediate appellate review by way of mandamus. The federal court properly retained jurisdiction of the case and Petitioners are not prevented from pursuing any of their valid causes of action and litigating this cause on the merits.

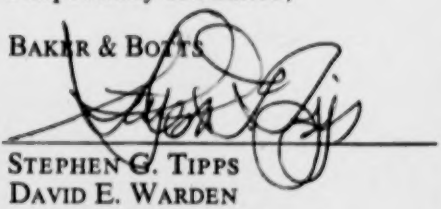
## CONCLUSION

The District Court properly analyzed and applied the law to this case. The Court of Appeals affirmed. There exists no error of fact or law. Petitioners have wholly failed to sustain their burden of establishing, pursuant to Rule 17, Rules of the Supreme Court of the United States, that there exists "special and important reasons" why the writ should be granted. Contrary to the protestations of Petitioners, the decisions below were controlled by and applied well settled legal principles, and did not involve any important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a

manner in conflict with applicable decisions of this Court or of any other Court of Appeals on the same matter. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

BAKER & BOTTS

By: 

STEPHEN G. TIPPS
DAVID E. WARDEN
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

*Attorneys for Respondent*
*Reliance Insurance Company*

December 15, 1983

# APPENDICES

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| RELIANCE INSURANCE COMPANY, a corporation,<br><br>Plaintiff,<br><br>vs.<br><br>RICHARD W. KOEB, as Receiver for Heritage Trust Company; ROBERT C. HATCH and CLAUDIA R. HATCH, his wife; and WALTER C. MADSEN, Superintendent of Banks, State of Arizona,<br><br>Defendants. | Civ. 77-843 PHX WEC<br><br>ORDER GRANTING PERMANENT INJUNCTION AND REQUIRING INTERPLEADER |

This matter having come on regularly for hearing on the Court's Order for Issuance of Process, Injunction Against Interpleaded Claimants, and Hearing, dated the 1st day of November, 1977, requiring the defendants and each of them, to appear ans[sic] show cause, if any they have, why they should not be required to interplead their claims in and to the sum deposited by plaintiff with the Registry of this Court, and why the temporary injunction heretofore issued by this Court should not be made permanent.

And it appearing to the court that:

(1) The Court has jurisdiction of this cause under Title 28, U.S.C.A., Section 1335, to grant the relief requested.

(2) This is an action in the nature of Interpleader commenced under and by virtue of 28 U.S.C.A., Section 1335, the statutory requisites thereof having been duly satisfied.

(3) The court's temporary injunction was duly entered pursuant to 28 U.S.C.A., Sections 1335 and 2361.

(4) The Court's order of November 15, 1977, dissolving the temporary injunction was entered without proper notice to opposing parties and an opportunity to be heard.

NOW, THEREFORE, IT IS ORDERED that the Court's Order of November 15, 1977, dissolving the temporary injunction may be, and the same is hereby vacated, and it is further

ORDERED that the defendants, and each of them, are hereby permanently enjoined and restrained from instituting or prosecuting, in any State court or in any United States court, any suit or proceeding on account of or pertraining to the liability of the Reliance Insurance Company on account of the issuance of its Bond No. B 729077 to Heritage Trust Company, or from continuing with the prosecution of any actions or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond, and

IT IS FURTHER ORDERED that the defendants and each of them be and they are hereby required to interplead and relitigate among themselves and with plaintiff their claims in and to the sum of ONE MILLION DOL-

LARS ($1,000,000.00) evidenced by the Bond on Interpleader heretofore delivered by plaintiff to the Clerk of this Court.

DONE IN OPEN COURT THIS 6th day of March, 1978.

/s/ WALTER E. CRAIG
Walter E. Craig
United States District Judge

## APPENDIX B

Rule 19, Federal Rules of Civil Procedure.

*Joinder of Persons Needed for Just Adjudication*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other

measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

## APPENDIX C

Title 28, United States Code, § 1447.

*Procedure after removal generally*

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.